DAYAKUASA HOLDINGS SDN BHD

v.

KAYAAL HOLDINGS SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[COMPANIES WINDING-UP NO: MT1-28-32-2002]
28 MARCH 2003

COMPANY LAW: *Winding-up - Statutory demand - Service of - "served on the company by leaving at the registered office" - Companies Act 1965, s. 218(2)(a) - Meaning and ambit of - Whether sending by registered post sufficient - Whether r. 18 Companies (Winding-Up) Rules 1972 applicable*

COMPANY LAW: *Winding-up - Opposition to petition - Non-service of statutory demand - Rebutting presumption of insolvency - Bona fide dispute as to debt - Whether filing of petition premature - Companies Act 1965, s. 218(1)(e), (2)(a) - Companies (Winding-Up) Rules 1972, r. 18*

WORDS & PHRASES: *"served" - Companies Act 1965, s. 218(2)(a) - Scope and meaning of - Whether can be equated with "sent" or "posted"*

CIVIL PROCEDURE: *Costs - Number of case authorities cited by counsel - Whether a surfeit of authorities - Whether too many cases cited ex abundanti cautela - Whether only relevant cases will have bearing on award of costs*

This was a petition that the respondent be wound-up under s. 218(1)(e) of the Companies Act 1965 ('the Act') for being unable to pay its debts. In opposing the petition, the respondent raised three main grounds, namely: (i) that the petitioner's statutory demand was ineffective as it was not properly served on the respondent in accordance with s. 218(2)(a) of the Act; (ii) that the respondent was not insolvent; and (iii) that the respondent had a bona fide dispute as to its alleged debts to the petitioner.

Held:

[1a] The petitioner had merely **sent** its statutory demand to the respondent's registered office by registered post. This was insufficient and did **not** amount to the demand being "**served** on the company by leaving at the registered office" as is required by s. 218(2)(a) of the Act. The ensuing words "a demand under his hand or under the hand of his agent thereunto lawfully authorised" in s. 218(2)(a) of the Act refer to the **signature** of

a the person issuing the demand or of its lawfully authorised agent (such as an advocate and solicitor) – and **not** to the service of the demand through a postal authority. (pp 394 e-h, 395 a-b, d, 396 e-h & 397 a-b)

[1b] The mode of service defined in s. 218(2)(a) of the Act takes precedence over the one prescribed by r. 18 of the Companies (Winding-Up) Rules 1972 ('the Rules'). This was because of the introductory words "Except as otherwise provided by the Act" in r. 18 of the Rules. In any event, even if r. 18 of the Rules was applicable in the instant case, the petitioner would still have not fulfilled its requirements because the statutory demand was not sent by prepaid post or acknowledgement-of-receipt post. (p 395 c & e-f)

[2] The presumption of a company's inability to pay its debts under s. 218(1)(e) and (2)(a) of the Act is one that is rebuttable; a company that fails to heed a valid statutory demand will not be wound-up if it can establish, by concrete independent evidence, that it is solvent. In the instant case, the respondent was able to prove its solvency through its credit balance in three banks as well as through its ongoing construction/ development projects. (p 398 a, c-d & f-g)

[3] The filing of the winding-up petition herein was premature. The statutory demand appeared to have been invoked to pursue a debt for which the petitioner had yet to obtain judgment. A demand cannot constitute *prima facie* evidence of a debt, and a winding-up petition may not be used as a means of enforcing a debt that has not been clearly determined. The most appropriate stage at which a creditor may wind-up a debtor company is after the crystallisation of its claim into a judgment sum, be it ever from a judgment in default. (pp 399 h & 400 a-d)

[Respondent's opposition to petition upheld; petition dismissed.]

Case(s) referred to:

Ann Joo Metal Sdn Bhd v. Pembenaan MY Cahaya Sdn Bhd [2000] 5 MLJ 708 HC ***(refd)***

BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd [2001] 1 CLJ 591 HC ***(refd)***

Dynasty Rangers Sdn Bhd & Anor v. Perak Meat Industries Sdn Bhd [2002] 6 CLJ 1 HC ***(refd)***

JB Kulim Development Sdn Bhd v. Great Purpose Sdn Bhd [2002] 2 CLJ 345 HC ***(dist)***

Kemayan Construction Sdn Bhd v. Prestara Sdn Bhd [1997] 5 MLJ 608 HC ***(refd)***

Malayan Banking Bhd v. Rex Box (M) Bhd [2000] 6 CLJ 21 HC ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Masboh Trading Sdn Bhd v. Mejaris Builders Sdn Bhd [2001] 5 CLJ 585 HC ***(refd)***
Metal Reclamation (Industries Sdn Bhd) v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290 HC ***(foll)***
Muniandy Thamba Kaundan & Anor v. D & C Bank Bhd & Anor [1996] 2 CLJ 586 FC ***(foll)***
Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 CLJ 722 HC ***(refd)***
Pioneer Concrete (M) Sdn Bhd v. Celini Corp Sdn Bhd [1999] 5 CLJ 145 HC ***(refd)***
Re Faco Pty Ltd [1988] 14 ACLR 518 ***(refd)***
RHB Bank Bhd v. Pembinaan MCP Sdn Bhd [2003] 5 CLJ 335 HC ***(refd)***
Transwater Corporation Bhd lwn. Idris Hydraulic (Malaysia) Bhd [2001] 1 CLJ 162 HC ***(foll)***
United Malayan Banking Corporation Bhd v. Richland Trade and Development Sdn Bhd [2000] 1 CLJ 57 FC ***(refd)***
Salak Park Development Sdn Bhd v. Fajar Menyensing Sdn Bhd [1994] 4 CLJ 580 HC ***(refd)***
Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd [2000] 7 CLJ 320 HC ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637; [1992] 1 CLJ (Rep) 303 SC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e), (2)(a)
Companies (Winding-Up) Rules 1972, rr. 18, 30(2)
Rules of the High Court 1980, O. 83 r. 2(4)

For the respondent - Sheena M Sinnappah; M/s Ho & Co
For the petitioner - Philip Anthony (Colin Victor George); M/s Bosco Philip Anthony & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Petition

This is a petition in encl. (2) presented by the petitioner for an order that the respondent be wound up on the ground of its inability to pay its debts under s. 218 of the Companies Act 1965; that the official assignee be appointed as the respondent's provisional liquidator and that costs be paid out of the respondent's assets.

For ease of reference, all sections quoted herein are the sections in the Companies Act 1965, and the Rules refer to the Companies (Winding-Up) Rules 1972 unless the context otherwise requires.

Service Of Statutory Demand

In opposing the petition, the first and foremost ground raised by Cik Sheena M. Sinnappah, learned counsel for the respondent, is that the petitioner has failed to serve the statutory demand on the respondent and hence the statutory demand is ineffective in law. She added that as the statutory demand was merely sent by registered post to the respondent's registered office, the petitioner has not strictly complied with the provisions of s. 218(2)(a) which she said required it to be "served on the company by leaving at the registered office". For this contention, she relied on *United Malayan Banking Corporation Bhd v. Richland Trade and Development Sdn Bhd* [2000] 1 CLJ 57 FC; *Masboh Trading Sdn Bhd v. Mejaris Builders Sdn Bhd* [2001] 5 CLJ 585 HC; *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd* [1992] 1 CLJ 637 SC; *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd & Anor* [1996] 2 CLJ 586 FC.

It was then argued for the respondent that r. 18 which provides for the mode of service cannot apply here in view of the opening words contained therein *viz*. "Except as otherwise provided by the Act or these Rules or any order".

En. Bosco Philip Anthony, assisted by En. Colin Victor George, learned counsel for the petitioner, contended that s. 218(2)(a) must be read with r. 18 and that the statutory demand has been served on the respondent through its lawfully authorized agent ie, the postal authority, relying on *Dynasty Rangers Sdn Bhd & Anor v. Perak Meat Industries Sdn Bhd* [2002] 6 CLJ 1.

Having regard to the aforesaid submissions, I am of the view that the issue in relation to the statutory demand is whether the petitioner by sending it by way of registered post to the respondent's registered office has complied with the provisions of s. 218(2)(a).

At this stage, I will first consider the case of *Dynasty Rangers, supra*, relied upon by the petitioner herein. The petitioner there had applied to wind up the respondent company on the ground that it was unable to pay its debt which arose from an arbitration award against two joint respondents. One respondent opposed the petition solely on account of what the respondent perceived to be an irregularity in that the arbitration award was against two joint respondents and that it was not open to the petitioner to proceed with only one respondent. Kang Hwee Gee J, held *inter alia*, that there was nothing irregular in the statutory notice. His Lordship's well-researched judgment did not support the contention of the petitioner herein which concerned the question as to whether sending the statutory demand amounted to serving it on the respondent.

The next point revolves around the petitioner's submission that the statutory demand has been served through the postal authority as the lawfully authorized agent. In my view, and with the utmost respect, to uphold this submission would do violence to s. 218(2)(a) especially the words *viz.* "a demand under his hand or under the hand of his agent thereunto lawfully authorized". These operative words, I hasten to add, clearly refer to the signature of the person issuing the demand. In other words, the statutory demand has to be signed by the company or its lawfully authorized agent such as, in the instant case, an advocate and solicitor, and cannot by any stretch of imagination, be construed to refer to the service of the statutory demand.

Next, r. 18 relied on by the petitioner contains the introductory words "Except as otherwise provided by the Act". Hence, where the Companies Act 1965 provides for the mode of service, such as that contained in s. 218(2)(a), then the mode of service under s. 218(2)(a) would apply to the exclusion of r. 18.

Since the statutory demand was merely sent by registered post to the respondent's registered office, but was not served on the respondent by leaving it at the registered office, it seems clear to me that the strict requirement of s. 218(2)(a) has not been complied with by the petitioner.

Be that as it may, even if I were to adopt a more liberal as opposed to a mere literal approach and invoke r. 18, it is to be observed that r. 18 provides that a document such as the statutory demand shall be deemed to be sufficiently served if left at or sent by prepaid post to the last known address of the person to be served therewith. Hence, the *sine qua non* here is prepaid post ie, AR (acknowledgment of receipt) post signified by the return to the sender of the "yellow card" with the acknowledgment by the recipient, as opposed to registered post. Hence, r. 18 still remains unfulfilled.

In *United Malayan Banking Corporation, supra,* cited for the respondent herein, the Federal Court through the judgment of Abdul Malek Ahmad FCJ agreed with the view of the Court of Appeal that under s. 218(2)(a), in order for the statutory demand to be effective, the demand must be served on the company by leaving it at the registered office. However, the issue of whether "sending a satutory demand to the registered office" of the respondent could constitute "serving" it for the purposes of s. 218(2)(a) was not before these courts.

In *Masboh Trading, supra,* a statutory demand was served on the clerk of the respondent company at the business address, not at the registered office as required by s. 218(2)(a). It was not disputed that the company did actually receive the demand. The issue there was whether by the petitioner's failure to serve the statutory demand "by leaving it at the registered office", the company cannot be deemed to be unable to pay its debt under s. 218(2)(a). Abdul Aziz

J (now JCA) at p. 588 held, *inter alia*, that since the deeming provision under s. 218(2)(a) created a rebuttable presumption (see *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437 FC), a rational approach to the requirement of service of the statutory demand at the registered office was called for, and the rational approach was to treat the requirement as no more than a prescribed method of service that was legally foolproof, but default in the observance of which was not prejudicial to the deeming if the company did in fact receive the statutory demand by service by other means or at some other place. Although this authority was relied on by the respondent, I am unable to see how it can in any way support the submission advanced for the respondent.

The Supreme Court in *Sri Hartamas Development, supra*, held that the statutory demand must comply with the requirements of s. 218(2)(a). There the facts were that by a letter dated 24 December 1988 the respondents sent to the appellants the statutory demand and that demand was served on the appellants on 27 December 1998. The Supreme Court rejected the contention that the statutory demand was bad on the ground that it did not give the statutory three weeks but instead a shorter time to comply with the demand. Gunn Chit Tuan SCJ in delivering the judgment of the Supreme Court held, *inter alia*, that the three weeks in s. 218(2)(a) refer to the neglect to pay and is not a requirement relating to the statutory demand itself. Again, I am doubtful if this decision is helpful to the respondent's case.

In *Muniandy, supra*, the Federal Court had the occasion to determine the meaning of the word "serve" in O. 83 r. 2(4) of the Rules of the High Court 1980 which is reproduced as follows:

> Where the hearing is adjourned, then, subject to any directions given by the court, the plaintiff must **serve** notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing. (emphasis added)

Edgar Joseph Jr, FCJ in delivering the judgment of the Federal Court held that "sending" the notice of the adjourned date of hearing to the chargors is a far cry from "serving" the notice for the purposes of O. 83 r. 2(4) above. I am mindful of the fact that the judgment was concentrating on the word "serve" in O. 83 r. 2(4). However, I subscribe to the view that it provides a binding judicial precedent on the ambit and meaning of the word "serve" in s. 218(2)(a).

After considering the authorities cited for the respondent, I am of the view that the judgment of the Federal Court in *Muniandy, supra,* is the only authority which is helpful to the respondent. I follow the principle enunciated herein and hold that sending the statutory demand is not tantamount to serving it on the respondent.

Although it is possible at this juncture to dispose of the hearing of the petition herein on this ground alone, I am nevertheless proceeding to deal with the petition on its merits, just in the event that I have erred in arriving at the above conclusion.

Respondent's Solvency

It was submitted that the respondent should not be wound up as it can establish by independent evidence that it is solvent, relying on *Malaysia Air Charter, supra.*

It was also contended on the basis of *Salak Park Development Sdn. Bhd. v. Fajar Menyensing Sdn. Bhd.* [1994] 4 CLJ 580 that the respondent's solvency is based on the fact that it is currently undertaking various construction projects totalling RM12,893,265 and as in October 2002 a credit balance amounting to RM215,710 in three banks *viz*. Hong Leong Bank Bhd, EON Bank Bhd and Bumiputra Commerce Bank (M) Bhd.

For the petitioner, it was stressed that it was too late now for the respondent to claim that the respondent was solvent, citing *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd and Other Appeals* [2001] 3 CLJ 248 CA.

It was then argued that the primary meaning of the phrase "unable to pay its debts" is the inability to meet current demands, seeking support in *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 CLJ 591; and *Pioneer Concrete (M) Sdn Bhd v. Celini Corp Sdn Bhd* [1999] 5 CLJ 145.

For completeness, it is pertinent to point out that s. 218 provides for the circumstances in which a company may be wound up by the court, and one such circumstance is that the company is unable to pay its debts under s. 218(1)(e).

Further, s. 218(2)(a) deems a company to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding RM500 then due has served on the company by leaving at the registered office a statutory demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

Even assuming for a moment that the statutory demand has been duly served on the respondent, I am of the view that the presumption under s. 218(2)(a) is a rebuttable presumption, as a company failing to heed a valid statutory demand would not be wound up if it can establish by independent evidence that it is solvent: *Malaysia Air Charter, supra*, following *Re Faco Pty Ltd* [1988] 14 ACLR 518 which was followed in *Masboh Trading, supra*.

I am unable to see the strength of the submission for the petitioner that it is too late for the respondent to establish its solvency as *Maril-Rionebel, supra*, did not support the petitioner's submission herein.

A respondent must, however, establish its solvency by concrete evidence, otherwise the presumption would remain unrebutted. Hence, in *BMC Construction, supra*, the respondent to a winding up petition based on a statutory demand for RM173,096.18 sought to prove its solvency by producing letters from its bankers stating the outstanding amount on its banking facilities and a two year old receipt. Jeffrey Tan J held, *inter alia*, that to prove its ability to pay its debts and to rebut the presumption of its inability, the respondent should state its assets and liabilities.

In *Pioneer Concrete*, Abdul Malik Ishak, J held, *inter alia*, that a company may have substantial wealth but which cannot be realized immediately, the company is said to be unable to pay its debts within the purview and ambit of s. 218(1)(e).

On the other hand, as in *Salak South Development, supra*, where a company's solvency is beyond question, an injunction was granted to restrain the defendant from presenting a winding up petition.

Having regard to the aforesaid authorities, the issue that calls for consideration and determination under this head is whether the respondent herein has established solvency and hence rebutted the presumption under s. 218(2)(a). In this connection, after perusing the respondent's affidavit in encl. (7), it is my specific finding that the respondent has established its solvency by reference to the aforesaid construction projects, and more importantly, the aforesaid credit balance in the three banks to rebut the presumption under s. 218(2)(a).

Bona fide Dispute Of Debt

It was the respondent's contention that there was a *bona fide* dispute of the debt which allegedly arose out of a purchase order issued by the respondent to the petitioner for the supply and installation of furniture at the Klinik Kesihatan (Health Clinic) Ayer Keroh at a consideration of RM310,000 and that there were variation works which had yet to be ascertained, but there was a retention fund of RM28,000 which the respondent contended was to be

retained for defects arising from the supply and installation works. The defective liability period was to expire on 14 November 2002 but the petition herein was prematurely presented on 4 September 2002. Reliance was sought by the respondent on *Kemayan Construction Sdn Bhd v. Prestara Sdn Bhd* [1997] 5 MLJ 608 HC; *Metal Reclamation (Industries Sdn Bhd v. JRC Tenaga Sdn Bhd (formerly known as Jaya Chloride Standby Power Sdn Bhd)* [2000] 6 CLJ 290 HC; and *Transwater Corporation Bhd lwn. Idris Hydraulic (Malaysia) Bhd* [2001] 1 CLJ 162.

For the petitioner, it was said that the respondent "categorically confirms the balance due and owing to the petitioner is RM28,000" and, relying on *JB Kulim Development Sdn Bd v. Great Purpose Sdn Bhd* [2002] 2 CLJ 345 HC; and *Malayan Banking Bhd v. Rex Box (M) Bhd* [2000] 6 CLJ 21 HC, argued that the respondent should be wound up.

It was further argued for the petitioner that the respondent was not disputing the respondent's claim for a sum exceeding RM500 and that on the strength of *Sri Binaraya Sdn Bhd v. Golden Approach Sdn Bhd* [2000] 7 CLJ 320 HC; and *Ann Joo Metal Sdn Bhd v. Pembenaan MY Cahaya Sdn Bhd* [2000] 5 MLJ 708 HC, the petitioner urged the court to allow the petition.

It is my specific finding that the submission by the learned counsel for the petitioner that the respondent has admitted the balance sum of RM28,000 seems to run counter to the affidavit filed herein, in particular para. 14 of encl. (7) filed by the respondent in opposing this petition. In that paragraph, which ran into the next page, it was clearly affirmed by one Tai Ken Loy, a director of the respondent, that the balance sum of RM28,000 was by way of retention fund to which the respondent was entitled to retain for defects arising from the supply and installation works.

It is trite law that an admission of debt would defeat the opposition to a winding up petition: *Malayan Banking Bhd, supra*, or where a dispute is not *bona fide*: *Sri Binaraya Sdn Bhd, supra; Ann Joo Metal, supra*.

Had there been an admission of a debt and an undertking to secure payments, as in *JB Kulim, supra,* I would have no hesitation in upholding the submission for the petitioner, but the facts as unfolded above are distinguishable from those in *JB Kulim*.

However, where there was a defect liability period, as in the instant petition, which was to expire on 14 November 2002 but the petition was filed on 4 September 2002 which was before that date, there was clear indication of a premature filing thereof.

This is determintal to the petitioner: *Kemayan Construction, supra*.

It is pertinent to state that the statutory demand herein has been invoked in order to pursue a debt in respect of which the petitioner has yet to obtain a judgment thereon. It is instructive to remind ourselves that in such a case the statutory demand cannot be deemed to be *prima facie* evidence of the debt, but merely to warn the alleged debtor of an impending petition and to invoke the presumption of inability to pay a debt, and that a winding up petition cannot be used as a legitimate means of seeking to enforce payment of a debt which has not been clearly determined (per Mohd Ghazali b Mohd Yusoff J (now JCA) in *Metal Reclamation, supra*; and also in *Transwater Corporation, supra*).

I would add that the most appropriate stage for a creditor to wind up a debtor company is after the crystallisation of the claim into a judgment sum, even if it is a default judgment. Such a judgment would effectively eradicate every endeavour to raise any dispute on the judgment sum at the hearing of a winding up petition, as the default judgment is still a valid and regular judgment and until and unless it is set aside, it is binding: *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722 HC; *RHB Bank Berhad v. Pembinaan MCP Sdn Bhd* [2003] 5 CLJ 335.

Other Grounds

Respondent's learned counsel raised other grounds *viz*. that damages to the respondent are irreparable; that the affidavit verifying the petition was not served on the respondent until the objection was raised by the respondent and non-compliance with r. 30(2) and the submissions by the petitioner's learned counsel in reply thereto.

As the aforesaid grounds in the respondent's opposition to the petition herein have shown sufficient merits, I do not feel the need to delve further into other grounds, except to commend all learned counsel for their diligence in that regard.

Conclusion

On the foregoing grounds, I am of the view that the opposition to the petition herein should be upheld and sustained. I therefore hold that the petition be hereby dismissed.

Be that as it may, in order to put the matter beyond any doubt, especially in respect of the respondent's solvency and dispute on the debt, I direct that on or before 18 April 2003, the respondent do deposit a sum of RM53,227.20 with the respondent's solicitors who shall hold the same in an interest-bearing client's account as stakeholders on an undertaking not to release the said amount

together with all accrued interest save and except to satisfy the petitioner's claim, if any, in the form of a judgment sum adjudged and ordered by a court of competent jurisdiction.

Costs

On the issue of costs, it is to be observed that a great number of authorities cited by all learned counsel herein were not entirely relevant or helpful to the respective submissions, and that there was a surfeit of authorities, which must have been included by counsel *ex abundante cautela*, but nevertheless calling for considerable discussion in my judgment herein. I must say that only the authorities relevant to the issues raised herein have a bearing on the quantum of costs. Having regard to the above, I hereby award costs to the respondent in the sum of RM2,500 which I consider fair and reasonable.